

The History of Constitutional Adjudication in Chile and the State of Constitutional Adjudication in South America

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Judicial Review, or Constitutional Adjudication, is one of the key components of the American constitutional system. It also represents one of the most distinguishable contributions of the American Constitutional experience to the world. Although not formally devised in the United States Constitutional Convention, Judicial Review evolved out of Marbury vs. Madison to be a key component of the American constitutional arrangement and eventually of most modern constitutions. Here I study the history of Judicial Review in Chile and analyze the state of Constitutional Adjudication in the ten largest South American countries. My objective is two-fold. First, I explore the influence that American constitutional thought had on Chilean constitutional life. I also consider whether American Constitutional influence extended to the realm of Judicial Review. I conclude that although there were attempts to adopt some form of Judicial Review early on, a formal process of Constitutional Adjudication was not adopted until 1969. Finally, I compare the current status of Constitutional Adjudication in Chile with

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that of Argentina, Bolivia, Brazil, Colombia, Ecuador, Paraguay, Peru, Uruguay and Venezuela. I report that some countries followed the European model of Constitutional Adjudication while others followed the American model. This, I conclude, is yet one more example of the dual theoretical grounds upon which many South American constitutions rest: American constitutional history and European constitutional tradition.

I divide the task in three sections. First, I discuss Chilean constitutional history and the influence of American thinkers and diplomats on the drafting of Chilean constitutions. Second, I discuss the emergence of Constitutional Adjudication and more specifically of the Constitutional Tribunal in Chile. Third, I compare the current status of Constitutional Adjudication in South America. Finally, I conclude by arguing that countries which established Judicial Review early in their constitutional tradition tended to follow the American model, but countries that adopted it later, like Chile, followed the European model of Constitutional Tribunals.

Constitutional Adjudication in Chile

As Pasquino points out (1997: 3-7), Constitutional Adjudication is a fairly new phenomenon worldwide. It is encompassed in the context of the emergence of several non-elected authorities who “are not politically responsible to the citizens” (Pasquino 1997: 4). The study of these institutions is central to the development of a theory of constitutional democracy. And following Pasquino, a theory of constitutional democracy “should analyze and compare different modalities of constitutional control and try to exhibit the rationale [alternatively the lack of rationale] of those institutions. I set out to do that for Chile specifically and for South America in a more general form. In general, I agree with Pasquino in that constitutional adjudication is central to the development of a

“new doctrine of limited government -- a post-democratic, not a pre-democratic one” (Pasquino 1997: 7). Pasquino claims that the starting point for such a study “would be in any event the classical doctrine of limited government from the 17th and 19th centuries (1997: 5). Yet, I will limit myself to analyze how those theories were used and interpreted (if not necessarily understood or even known) in the Chilean Constitutional experience since independence.

In general, we can identify two broad forms of Constitutional Adjudication. The U.S. system developed in such a way that the Supreme Court took on the role of Constitutional Adjudication. For that reason, we often speak of Judicial Review. In most European nations, on the other hand, the role of Constitutional Adjudication rests upon a special body created for that specific purpose. Often called Constitutional Tribunals, these bodies have members appointed by the legislature, the executive and sometimes the judiciary, the length of memberships varies, but in general, members are not accountable to anybody for the decisions they make. Just as Supreme Court justices are intended to be shielded from political pressure, members of Constitutional Tribunals are expected to safeguard for the constitutionality of laws, decrees and decisions made by the authorities. As I show below, Chile and South American nations in general, have attempted to establish Constitutional Adjudication mechanisms following both the example of the United States' Judicial Review system and European Constitutional Tribunal models.

Chile first achieved independence in 1810. However, as in most other Latin American countries, the first attempt at independence was to be short lived. The Spanish crown regained control of its colony shortly after 1810 and full independence was not achieved until 1818. Nonetheless, we can still identify the 1810-1818 period as a time of state formation. In 1810 Chile formally declared independence and in 1833 the country adopted a constitution that was to last for almost one hundred years. During the 1810-1833 period, several constitutions were drafted

and a few were adopted. None lasted long enough for their usefulness and efficiency to be fully tested. The constitution adopted in 1833 lasted until 1925. That year a new constitution was adopted, which lasted until the democratic breakdown of 1973. In 1980, the military adopted a new constitution which remains in place to this day. Below, I analyze the four constitutional periods separately. First I study the 1810-1833 period, where the influence of American constitutional thought was greatest. Then I consider the 1833 Constitution, characterized by a unique mixture of presidentialism and parliamentarism where Constitutional Adjudication was a prerogative of parliament. Third, I turn to the 1925 Constitution, where provisions for Judicial Review were granted to the judiciary but the *Contraloría* evolved to occupy that role. I also consider the 1969 constitutional amendment that created a Constitutional Tribunal. Finally, I consider the post 1973 period, with the 1980 Constitution, which established a Constitutional Tribunal. I finally mention briefly how the Constitutional Tribunal has operated since its creation after the 1989 elections.

Chilean Constitutional Periods

The 1810-1833 Period: Constitutions to Choose From

Constitutional Rules of 1811: Shortly after the declaration of Independence in 1810, a Constitutional Convention was called for by the Revolutionary Junta that had declared independence on September 18, 1810. Not by accident, the delegates met on July 4, 1811 and came up with a short-lived “*Reglamento Constitucional*”. The constitutional by-laws aimed at “separating public powers and establishing the limits of each power” (in Campos Harriet 1977: 328; *all translations are mine*). However, as Campos Harriet notes, the 1811 Constitution did little to establish separation of powers. The judicial power is not even mentioned

in the document and the executive power is chosen by the parliament. In fact, all powers were vested upon the parliament.

Constitutional Rules of 1812: In 1812, a new constitutional charter was adopted. The influence of the U.S. delegate to Chile, Joel Robert Poinsett, was apparent in the content of the document as well as in the adoption of it. To be sure, American influence on Chilean constitutional thought did not begin with Poinsett. In 1807, independence leader Martínez de Rosas developed a close friendship with an American physicist, Procopio Pollock whom advocated the adoption of a charter similar to that of the American Convention. Pollock circulated a manuscript on constitutionalism that is said to have influenced Martínez de Rosas and others (Campus Harriet 1977: 326). Poinsett's influence, however, was more clear and decisive than pro-American tendencies that had existed before. Most Chilean constitutional scholars regard the 1812 document as the first Constitution of the country. It established the grounds for independence from Spain. It effectively separated powers, established a system of representation and expressed individual rights. The document was drafted and discussed by a handful of men in Poinsett's home and then was submitted for ratification by the provinces (*cabildos*), apparently by Poinsett's suggestion. The document followed the American Constitution modeled on the separation of powers. However, like in the American document, no provisions for Constitutional Adjudication were established. The short life of that constitution might have prevented the Supreme Court from following the example of its American counterpart in establishing the constitutional grounds for Constitutional Adjudication.

Constitutional Rules of 1814: The 1812 Constitution found support in Independence leader José Miguel Carrera and his associates. Carrera was known to admire the United States and its independence movement. He was also a good friend of Poinsett. However, when the internal

power struggle shifted in favor of Bernardo O'Higgins, Carrera was exiled and then killed. Poinsett's influence was significantly diminished and the 1812 Constitution was replaced. O'Higgins had a new charter drafted where all executive and legislative powers were vested upon a Supreme Director of the Nation (himself). The adoption of the principle of separation of power and an independent judiciary in the 1812 charter were lost as O'Higgins concentrated all the power on the executive power, which he hoped he would control. O'Higgins, the son of a Irish-born former Spanish Viceroy of Peru, had been educated in Europe and although he was not hostile to the United States, he was hostile to Carrera and to Carrera's friends. Whatever influence Poinsett had with Carrera was significantly diminished with the rise of O'Higgins. Likewise, the America Constitution was no longer identified as the model to be followed.

Constitution of 1818: The Spanish Army returned and ruled the country from 1814 to 1818. Chile finally signed the Declaration of Independence in 1818 when the San Martín Liberation Army defeated the Spaniards. O'Higgins, a general in San Martín's army as well, named a 7-member committee to draft a new Constitution. The document, tailored made to meet O'Higgins's demands was then approved in a plebiscite on October 23, 1818. The executive power rested upon a Supreme Director chosen by the provinces, a move that mirrored the American example. However, the executive (the Supreme Director) appointed the members of the Supreme Courts and the members of the unicameral parliament as well. So, even though formal separation of powers existed, the Judicial and Legislative powers were controlled and appointed by the executive. The extreme centralization of power in the executive prevented the independence of either one of the other two bodies. There is no need for Constitutional Adjudication when there is no room for conflict between the different branches of the state. The 1818 Constitution marks the

departure from constitution making solely based on the United States constitutional experience.

Constitution of 1822: A new document was drafted in 1822 in order to reduce the powers of the executive. A bicameral congress was created with a non-elected senate comprised of generals, priests, judges and others appointed by the Executive. The Chamber of Deputies was to be chosen by electors selected by lot in each municipality. No provisions were made for Constitutional Adjudication because, even though there was separation of powers, there were no checks and balances provisions. In practice, Judicial Review rested upon the Executive, who appointed the Judiciary (Campus Harriet 1977: 340-345). Rakove (1997: 6) suggests that a condition of legitimacy for Judicial Review is the independence of the judiciary. In the Constitution of 1822 the judiciary was all but independent and no formal provisions for constitutional adjudication were adopted.

Constitution of 1823: With the fall of O'Higgins in 1823, a period of political and constitutional anarchy ensued. In 1823 a new constitution was adopted. The document's main drafter was Juan Egaña, a highly conservative scholar and lawyer trained in Europe. The 1823 Constitution clearly established the separation of powers between the elected executive and the elected unicameral parliament. An unclear provision, which might be understood as a form of constitutional adjudication, was also included in the document. If disagreements on interpreting the Constitution were to arise between parliament and the executive, a National Chamber would convene to render a decision. The National Chamber was to be composed of notable citizens chosen by lot whose terms would last for 8 years (Campus Harriet 1997: 346). There is no record of the National Chamber ever meeting. However, Egaña created a precedent for a Constitutional Tribunal and limited the Judicial Review power of the Supreme Court. After Egaña's 1823 document, almost an

entire century would pass before Constitutional Adjudication was adjudicated to the Supreme Court again. And then, apparently, the Supreme Court rejected it.

The Federal Laws of 1826: The political influence of José Miguel Infante in 1825 led to a new Constitutional Convention with representatives from the provinces. Infante perceived the Federal system in the United States as a model for the political organization of the country. He influenced the choice of the convention delegates and assembled a group of people who shared his views. The Convention disbanded before a complete document was drafted and therefore the 1826 Laws never became a Constitution. However, for the first time in the country's history, Constitutional Adjudication was formally incorporated into the text of the Constitution. Yet, that Constitution was never adopted.

The 1828 Constitution: A new attempt at Federalism was attempted in 1828. The 1828 Constitution created several mechanisms of check and balances between the executive, legislative and judiciary and still attempted to maintain some form of check and balances between the central government and the provinces. However, the weak role assigned to an already existing weak judiciary made Constitutional Adjudication impossible to effectively exist. Moreover, Juan Egaña's views on Constitutional Adjudication were still prevalent in the nation. If Constitutional interpretations were needed, then a Constitutional Convention should be called. After all, several conventions had been called during the past decade and constitutions had lasted, on the average, only a couple of years each.

In general, all the Constitutions drafted and adopted in the 1810-1833 period were chiefly concerned with the executive and legislative powers, on how the executive and legislators were to be elected and the division of powers between them. The judiciary did not occupy a pivotal role in all but two of those constitutions. Constitutional

Adjudication was formally present in one constitution, although it was never adopted. There is sufficient evidence, nonetheless, to speak of American Constitutional influence throughout the period. That influence, however, was strongest at the outset of independence and lost ground as time passed. As we will see below, Chile eventually developed a parliamentary system, moving away, at least temporarily, from American presidentialism. The roots of Constitutional Adjudication, however, are found in those constitutions. Yet, as we see in the next section, Constitutional Adjudication was not to become a constitutional issue until the institutional breakdown of 1891. Probably the short life of the constitutions between 1810 and 1833 explain why Constitutional Adjudication did not emerge (they did not interpret the constitution, they simply changed it). Or, as Ferejohn notes, “if, on the other hand, it [a constitution] is easy to amend, interpretive latitude is diminished at the price of an increased frequency of amendment” (1997: 6). In the case of Chile, and paraphrasing Ferejohn, when a constitution is easy to be replaced, interpretive latitude is significantly diminished. In any event, the 1810-1833 period did not witness the development a coherent form of constitutional adjudication.

The 1833 Constitution: Parliamentarism and the Great Elector

A new effort to establish constitutional rule in the country was undertaken in late 1831. A new Constitutional Convention was called and a new document was drafted. The 1833 Constitution lasted for almost a century. The document was drafted chiefly by Manuel Gandarillas and Mariano Egaña, the son of late Juan Egaña. Egaña was influenced by his educational stay in Europe, where he learned about the English parliamentary system. Gandarillas, on the other hand, seemed to have admired more the American model, characterized by an independent and popularly elected president. The end result was a document that established a mixed system. The president was granted wide executive powers,

including a wide range of decree powers. The parliament was entrusted with protecting the constitution, enacting laws and the power to impeach members of the president's cabinet (Campos Harriet 1977: 356-366).

The strange mixture of presidentialism and parliamentarism set the ground for continuous conflict between the two powers. The president did not need the parliament to enact laws for he could govern via decrees or veto almost any action of the parliament. Moreover he could suspend the Constitution under a wide range of conditions. The parliament, on the other hand, was allowed to remove cabinet members as a means to retaliate against the president. Congress also had the power to amend the constitution and it did so continuously until the presidency was stripped off many of its powers. As a result, a parliamentary system was fully in place by the end of the 19th century.

Article 163 of the 1833 Constitution gave Congress, and Congress only, the power to interpret the constitution and judge over constitutional disputes that might arise (cited in Hancock no date: 499). However, there is no history of any constitutional crisis during the period except in 1891 when constitutional rule broke down.

The 1833 Constitution was characterized by an unusual division of powers between the executive and the legislative. Rather than establishing a system of checks and balances between the two bodies, several provisions for interference by one body on the other body's constitutional power were set in place. By using its amendment power, the parliament eventually reduced the executive's intrusive power on legislative matters and emerged as more powerful than the executive. Little if any room was left for the judiciary. Although courts, including a Supreme Court, were established, their realm of operation was strictly limited to setting disputes between private individuals. Courts were not to interfere in government decisions.

The executive, on the other hand, was handed a card all presidents used skillfully. The electoral laws allowed the executive to control the electoral process. The president came to be known as the Great Elector,

for he had the ability to significantly alter the composition of Congress in every election (Collier and Sater 1996: 56-57). An effective, albeit undemocratic, form of check and balances then did exist. Congress kept the president in check and the president had a strong influence on who would be elected to Congress. As Reinsch puts it, “the president governed with a congress which he had himself largely elected” (1909: 512).

The 1833-1890 period was characterized by a continuous conflict. The parliament continuously modified the constitution and the president continued to exert a strong influence on electoral outcomes. By 1886, however, when president Balmaceda was elected the equilibrium between the Great Elector and Parliament was no longer maintainable. The development of a working class in the northern mining areas of the country and the growth of the urban working and middle class population put significant pressures on expanding the electoral basis and made elections more meaningful. Increased pressures on the president to respect the independence of elections and not tamper with electoral results placed the president at a disadvantage with the parliament. If the president could no longer be the Great Elector, then his effective power was reduced. By 1891 a crisis erupted and parliament emerged triumphant.

President Balmaceda was elected in 1896 but lacked support in Parliament due to his unpopular cabinet. The senate successfully prevented President Balmaceda from forming a cabinet he could work with and the president refused to give in to senate demands. The national budget needed to be passed and the senate threatened to not vote on the budget unless the president agreed to their demands. The president decided to adopt the same budget as the year before and bypass the senate. Reinsch asserts that “the provision of the constitution that only in virtue of a law there can be fixed annually the expenses of the administration..., the president interpreted as imposing a duty upon parliament. The duty not having been performed, he declared he was forced to

govern the country ... by direct exercise of his presidential power” (1909: 513).

The parliament ruled that the president had acted unconstitutionally. “All rivalries and enmities between these parties were buried and they cooperated loyally in the cause of upholding the constitutional powers of parliament” (Reinsch 1909: 513). A short-lived civil war ensued. The Navy and a majority of the Army sided with the Parliament and President Balmaceda sought asylum in the Argentine Embassy where he eventually committed suicide.

Throughout the nineteenth century, the members of the Chilean parliament were not paid and working and middle class representatives had been successfully prevented from winning office. Thus, parliament was comprised of the landed aristocracy. The support parliament received from the Navy and the Army resulted more from their association with the aristocracy than from the armed forces’ interpretation of the constitution. Nonetheless, in purely technical terms, constitutional adjudication was a prerogative of parliament and the president did step outside his constitutional prerogatives.

With Balmaceda’s death, parliamentary government was fully adopted without altering the 1833 Constitution significantly. In fact, “no formal change was made to the constitution, but it was understood by everybody that hereafter a president should not be able to govern without submitting to the public will as expressed by parliament” (Reinsch 1909: 514). Since then, and until 1925, Chile was “the only country in the new world which has the cabinet system of government; parliamentary government exists here in its most extreme form, as the executive is not given the power of dissolving the popular chamber” (1909: 509). The similarities with the British Parliament are evident, but the president continued to be elected in direct democratic elections. However, he was required to choose his cabinet members from among the members of the senate. After a century of independence, Chile had moved away from the American system of a strong president and

separation of powers to an English-like parliamentary system where cabinet members were elected from among members of parliament and whom could be removed by a parliamentary vote of no confidence. Although there were no actual cases of Constitutional Adjudication during the period, Chile was in fact like England by having the power to make and interpret law reside with the parliament. So even though the Chilean presidency was strong (and modeled after the United States), the Chilean parliament was granted extensive powers (modeled after the English Parliament).

Reinsch reported in 1909 the profound discontent with the parliamentary system existing in Chile. Yet, it was not until 1925 that the system collapsed. In 1920, a popular senator from the northern mining regions, closely identified with the growing working class, was elected president. Arturo Alessandri attempted to pass several reforms on labor legislation but the parliament opposed the reforms. In 1924, after several months of gridlock, members of parliament agreed to the first piece of legislation in months, a pay raise for themselves. A group of young military officers entered Congress and expressed their discontent. The young officers' action compelled the parliament to quickly pass the reforms Alessandri had advocated. However, it was made clear that it was with the military officers, not with Alessandri, where power rested. Alessandri requested a license to travel abroad only to return by acclamation a year later. He successfully managed to get a new constitution drafted and approved. This put an end to the parliamentary period in Chile and it also put an end to Constitutional Adjudication as an exclusive power of the legislature.

The 1925 Constitution and The Constitutional Tribunal (1969)

The charter promulgated in 1925 and approved in a popular plebiscite did not put an end to the period of political anarchy in the country. Alessandri, having returned to power, soon found himself captive to the

interests of the military corps. He resigned and a period of political chaos followed. The military strongman, General Ibañez, had himself elected in a two-candidate election in 1927 (the other candidate, a socialist, was jailed on an off shore island). Ibañez himself fell in 1931 and several governments succeeded each other until Alessandri was once again elected in 1932 for a six-year term. He was the first president to serve the full constitutional term as devised in the 1925 Constitution.

With Alessandri's presidency (1932-1938), the 1925 Constitution came into effect and it ruled the country until the democratic breakdown of 1973. A return of the American system of clear separation of powers between the president and the executive, check and balance provisions characterized the 1925 Constitution as well. Cabinet members were to be appointed at presidential discretion and the president would also control the legislative agenda. The bi-cameral congress would still be in charge of passing legislation, but presidential veto power was put in place. Moreover, the adoption of a proportional representation electoral system fostered the development of a multi-party system.

The 1925 charter entrusted the Supreme Court with the power to interpret the constitution and declare new laws unconstitutional (art. 86). The Supreme Court, however, apparently never made use of this constitutional provision. Contrary to the direction undertaken by the American Supreme Court, the Chilean highest court chose to not get involved on constitutional matters. As it should be recalled, the American Supreme Court self-adjudicated Judicial Review by interpreting the constitution. In the famous opinion written by Chief Justice Marshall in 1803, in *Marbury vs. Madison*, the Supreme Court argued that "it is emphatically the province and duty of the judicial department to say what the law is... If two laws (and the constitution is a law) conflict with each other, the courts must decide on the operation of each" (in Pasquino 1997:10).

In Chile, on the other hand, the Supreme Court was reluctant to take up that challenge. Moreover, Rakove's condition (1997: 6) that judicial independence is a necessary condition for Judicial Review to become

legitimate was not met. The situation in Chile was not like in the United States where “the influential segments of the American political community ... accepted the benefits of allowing professionally expert judges to act as independent sources of legal authority” (1997: 7). In Chile, the judiciary was seen neither as independent nor as capable of successfully emerging as a body of constitutional adjudication.

A combination of the Supreme Court’s reluctance (or inability) and the creation of an independent bureaucracy to safeguard fiscal responsibility on presidential expenditures led to the development of a unique system of Constitutional Adjudication based on purely technical grounds. In the early 1920’s, a Professor of Economics at Princeton, Edward Kemmerer, was hired by several Latin American nations to help them solve their financial crisis. Kemmerer traveled extensively throughout the Andean countries and attempted to create a Central Bank and a National Comptroller’s Office in every country. Although Kremmerer was not formally associated with the U.S. State Department and despite his effort to keep distance from American Embassies in the countries he visited, his view of economic efficiency were obviously influenced by his own life experience as much as by his economics training.

Kremmerer first visited Chile during the first presidency of Arturo Alessandri, when the 1833 Constitution still ruled the land. Subsequent visits by Kremmerer took place during the Alessandri government after the 1925 constitution had been adopted and most notably during the Ibañez administration (1927-31). Kremmerer was responsible for creating the Central Bank and the *Contraloría General de la República*. While the Central Bank was created to control macro-economic policies, the *Contraloría* was created to curtail the discretionary spending power of the president. To be sure, “previously in Chile several uncoordinated institutions with overlapping functions and jurisdictions had exercised tardy and haphazard fiscal control. To improve its economic planning and accounting the government was already designing a single, powerful

fiscalizing agency before Kremmerer arrived. It then used his mission to consummate the project” (Drake 1989: 103).

The Contraloría was created in 1927, two years after the 1925 Constitution had come into effect. Ibañez, however, went further than Kemmerer had proposed. The Contraloría was entrusted, as Kemmerer had suggested, with overseeing fiscal propriety of government expenditures. Ibañez also gave the Contraloría the authority to rule on the constitutionality of government expenditures (Drake 1989: 104). With this move, Ibañez had set in motion a process of Constitutional Adjudication which, as Drake correctly points out, transformed “comptroller into a virtual fourth branch of government” (1989: 104).

However, the Contraloría was created by a law, the office was not created by modifying the Constitution nor was it included in the Constitution or its power spelled out in the Constitution. Only in 1941 did a constitutional amendment establish grounds for impeachment of the *Contralor*. In 1971, when president Allende was carrying forth his mining nationalization plan, another constitutional amendment was passed expanding the power of the *Contraloría*. Law 17,450 of July 15, 1971, authorized the *Contraloría* to determine the amount of compensation foreign companies should receive in the nationalization process (*Constitution of the Republic...: 40*).

The *Contraloría* was originally charged with overseeing the presidency and government expenditures. The *Contralor General* was to be appointed by the president but, as with Supreme Court Justices, his term would expire at voluntary retirement or death. Although impeachment procedures were introduced in 1941, I have found no instances where a *Contralor* was impeached.

One might argue that watching over government expenditures and presidential decrees is not what Constitutional Adjudication usually entails. That is certainly the case, yet in a country with a strong presidentialist system, watching over the president means safeguarding the legislative against abuse by the executive. Moreover, because the presi-

dent also had decree power, the comptroller's office served as a check on presidential authority. Furthermore, because every law needed to be registered with the comptroller's office, the *Contralor* was given the power to review each piece of legislation to test, a priori, its constitutionality.

Yet, the criticism still stands. The *Contraloría* could only issue mandatory rulings on government expenditures, not on the constitutionality of laws. The later were only advisory in nature. Therefore, even if the *Contraloría* indicated that a provision of a law might be unconstitutional, it was by no means necessary that the law would not be enacted. Moreover, the *Contraloría* had little effective enforcement power. Yet, that apparently was not an issue until 1970. Then president Allende used his decree power to push forth his nationalization plan and the opposition-controlled Congress vehemently opposed him, the *Contraloría* often ruled president Allende's decrees unconstitutional but the president continued to enact them.

In part, the lack of clarity of the *Contraloría* role was a result of a combination of two factors. The Supreme Court was unwilling to take up its constitutional role of Constitutional Adjudication established in the 1925 Constitution. It should be recalled that the 1833 charter did not give the Supreme Court that power. However, earlier constitutional attempts had modeled Judicial Review after the American example as seen above. Yet, the 1833 Constitution had shaped the Chilean Supreme Court in such a way that when it was once again granted the power to rule on the constitutionality of laws it did not take up the challenge.

The *Contraloría* evolved to fill the gap. While at first it was charged with monitoring the actions of the president, it eventually evolved into a Constitutional Tribunal of a sort. Monitoring the actions of the president is no small matter in a very strong presidentialist system. Yet, the adoption of the 1969 Constitutional Amendment made it clear that Chile had changed. The need for a formal Constitutional Tribunal emerged as the

electorate expanded and the middle and working class solidified their positions as the urban population grew and the rural population became politically involved (Collier and Sater 1996: 285-329).

The 1969 Reform came into effect at the end of President Frei's government (1964-1970). The leader of the Christian Democratic Party, Eduardo Frei Montalva, was elected with the support of conservative parties that wanted to prevent socialist leader, Salvador Allende, from coming to power. The enfranchisement of women in 1949, rapid urban growth, high levels of polarization in rural areas (resulting in part from the agrarian reform in 1965, but also having helped originate it) and the continuous electoral gains of socialists and communists forced a revamping of the institutional structure set in place in 1925.

Because of the multi-party electoral system, for constitutional amendments to be adopted, a large majority of the parties needed to agree in the reform. The 1969 reform was passed because it included two provisions that were key to all parties involved. First, a Constitutional Tribunal was established, charged with ruling the constitutionality of the actions by the executive and the legislative. Second, an Electoral Tribunal was established to monitor elections. While the Constitutional Tribunal apparently favored conservative parties, in case Allende would eventually win the presidency, the Electoral Tribunal favored leftist parties as it would guarantee that conservative parties would accept an electoral victory by the left.

A 7-member Constitutional Tribunal was created. Below I further discuss the Tribunal's powers. Here I will only mention that the Constitutional Tribunal only lasted from January 1970 to September 1973. During that short period, however, the Constitutional Tribunal was often convened and it met frequently. Because of reasons that lie well beyond the scope of this paper, the Constitutional Tribunal was unable to settle disputes between the executive and legislative or to prevent, for that matter, the democratic breakdown of 1973. Certainly, one of the reasons is that it came into existence too late and therefore it could not be

perceived as an independent power. The Tribunal was generally perceived as a tool to prevent Allende from implementing his program. For some that was good, for others it was bad.

I certainly do not want to venture into explaining the causes of Chile's democratic breakdown of 1973. Neither do I claim that with a well established Constitutional Tribunal the breakdown would not have occurred. I do claim, however, that the Constitutional Tribunal came into existence at perhaps the worst possible time, when the conflicts between the executive and the legislative were at an all-time high and when many, if not most actors, regarded democratic stability as neither necessary nor desirable. So, although the Constitutional Tribunal did exist before 1973, it only became operational after the restoration of democracy in 1989.

The 1980 Constitution

With the 1973 democratic breakdown, the military Junta suspended the 1925 Constitution and began to govern by decree. A Constitutional Commission was created and a new Constitution was proposed in 1979. The military Junta revised the document, made some changes (that mostly increased the power of the military over civilian matters) and called for a constitutional plebiscite. The plebiscite, held on September 11, 1980, was characterized by lack of access to the media for the opposition, political repression and the lack of electoral rolls or an electoral tribunal. Not surprisingly, the Constitution was approved by a wide margin of votes. Although there apparently was no widespread fraud, there was an unlevelled playing field where an open discussion about the merits and implications of the constitution proposed could not be freely discussed. For that reason, and despite having apparently won a majority of votes, the 1980 Constitution should be characterized as having being imposed upon the country by the military rather than ratified in a plebiscite by a free and informed and electorate.

The new Constitution gave General Pinochet an 8-year presidential term at the end of which a plebiscite would determine if the electorate approved the presidential nominee of the military Junta for a new 8-year period. The social protests that erupted in 1982-84 forced the Junta to make concessions to the opposition and begin a process of slow democratization. Political parties were legalized, an electoral registry was established and certain democratic guarantees were agreed upon to make the 1988 plebiscite a more fair process.

In 1988 General Pinochet was proposed as the presidential candidate but he was defeated in what has been since regarded as the crucial moment in the process of democratization of Chile. In 1989 as a result of Pinochet's defeat, the military government and the opposition agreed on a set of constitutional reforms that were submitted to a national plebiscite. The reforms helped the opposition reduce the role of the military in future governments. The plebiscite in a sense also helped validate the 1980 Constitution, something the military was very interested in doing. Since the election of a democratic regime in 1989, the Constitution has been subject to small but steady democratizing reforms. The role of the military has been reduced further, although they continued to have a pivotal role in Chilean politics.

The 1980 document established a Constitutional Tribunal as well. It also gave the *Contraloría* a constitutional standing, as discussed below. Although the Tribunal was formally established in 1982, it did not become fully effective until the restoration of democracy. The 7-member tribunal was fully appointed by the outgoing military regime. During the 8 years it has co-existed with a democratic government, the Tribunal has maintained a low profile. The *Contraloría* continues to exert its daily monitoring function and that has helped minimize the role of the Tribunal. The Tribunal has met, however, several times as conservative parties have questioned the legality of the center-left government's actions. For the most part, however, because it was clear what the Tribunal would rule if the government undertook certain actions, the

mere existence of the tribunal has served as deterrence for the government.

The Constitutional Tribunal in Chile

As discussed above, the concept of Constitutional Adjudication was first introduced in the early 18th century and it resulted from the influence of American diplomats and from the writings and influence of Chileans who were admirers of the American Constitutional experience. However, the 1833 Constitution and the continuous conflict that it generated between the executive and legislative prevented the development of a coherent tradition of Constitutional Adjudication. Eventually, the parliament would use its power to interpret the constitution to impeach President Balmaceda in 1891 and establish a parliamentary system. The institutional breakdown of 1925 did lead to the writing of a new Constitution, but provisions for Constitutional Adjudication never materialized. The creation of a *Contraloría General de la República* in 1927 did help alleviate the need for Constitutional Adjudication. The *Contraloría* worked as a Constitutional Tribunal in many respects. By having the power to return legislation back to the executive and the parliament for corrections, the *Contraloría* became a de facto Constitutional Tribunal. It did so, however, as a result of two factors: the unwillingness of the Supreme Court to take on a Constitutional Adjudication role and the *Contraloría* independence from the executive power.

As discussed above, the Supreme Court adopted the position that the judiciary was to apply the law not interpret it. To be sure, as Deener (1952) points out, the legal background of Latin America was civil law, particularly Spanish law. Consistent with that tradition, comprehensive civil and criminal codes were written in the 19th century. The tradition

and the codes helped the courts adopt the framework that favored application over interpretation of laws. Laws were to be comprehensive and in case interpretation issues were to arise, the parliament or the government (in case of decrees) needed to clarify the meaning of the laws. Although the 1925 Constitution granted the Supreme Court the power to interpret the Constitution, the Supreme Court and the lower courts maintained the 19th century tradition.

With the creation of the *Contraloría* in 1927, the most immediate Constitutional Adjudication issues were undertaken by the *Contraloría*. The 1925 Constitution established a very strong presidency. The executive was granted decree powers and the control of the legislative agenda. A centralized spending and tax collecting system also gave the executive unchecked power over actual budget allocations. Congress could do little to restrict the power of the president to govern by decree. Certainly Congress could pass legislation to overturn certain decrees and establish jurisprudence in those areas. However, the president had veto power (that could be overridden by a 2/3 vote of both chambers) and, more importantly, the president controlled the legislative agenda. In this manner, the president could block congressional initiatives to legislate in areas where the executive was governing by decrees.

The *Contraloría* was devised to check president's decree and spending power. As a life term position appointed by the president and in charge of an independent bureaucracy, the Contralor emerged as a powerful counter force to the president. The *Contraloría* effectively became an independent, very efficient but highly technical bureaucracy. Its main mission was to oversee the actual spending of the budget and to revise executive decrees. It was also charged with revising new legislation and alerting Congress and the president if new laws contradicted previously existing legislation. Often, the *Contraloría's* warning would lead Congress to amend the new law or suppress previously existing legislation. By overseeing budget expenditures, the *Contraloría* only checked the executive power and local municipalities. The legislative

power had no control over the *Contraloría*, but senators and deputies often filed complaints with the *Contraloría* to check on government spending on certain areas and to force the executive to negotiate with Congress on specific details of spending bills.

By overseeing executive decrees, the *Contraloría* assumed the best known features of the Judicial Review role of the U.S. Supreme Court. The executive could govern via decree in the absence of legislation on certain matters. By having the *Contraloría* register all decrees and certify their constitutionality, the country effectively had a Judicial Review body for all presidential actions. Similar to the unexpected consequences Judicial Review had in the United States, the role of the *Contraloría* evolved to acquire a predominant place in the institutional arrangement of the country.

Although presidential actions are particularly powerful in countries with presidentialist constitutions, Constitutional Adjudication encompasses more than overseeing presidential actions. The constitutionality of laws remained to be a legal problem for the country. With the Supreme Court unwilling to determine the constitutionality of laws and the *Contraloría* simply assuming its role to point out contradictions between existing and new legislation, there remained a legal constitutional gap in the country.

Because the review took place before the law was enacted, one would be inclined to compare the Chilean *Contraloría* with the French Constitutional Council. However, because the role of the *Contraloría* evolved over time into a Constitutional Adjudication role rather than resulted from an intentional decision when the *Contraloría* was created, the comparison with the U.S. experience is more appropriate. Clearly, the French Constitutional Tribunal has a well-defined constitutional mandate (Pasquino 1997), whereas the Chilean *Contraloría* or the U.S. Supreme Court did not have a constitutional mandate to emerge as the Constitutional Adjudication bodies in their respective countries.

The growth of the electoral left represented by the Socialist and Communist parties since the 1930s and the coming to power of Christian Democrats in 1964 tested the effectiveness of the *Contraloría*. In particular, it tested the *Contraloría's* ability to deter the executive from interpreting existing laws to give in to popular demands for increased spending, educational reforms and most importantly agrarian reform. The Christian Democratic government of Eduardo Frei (1964-70) worked with Congress to pass agrarian reform, mining nationalization and educational reform legislation. However, the Socialist government of Salvador Allende (1970-73) did not find a sympathetic Congress and thus tested the Judicial Review enforcement limits of the *Contraloría*.

The *Resquicios Legales* (Legal chinks) incident serves as a good illustration of the *Contraloría's* inability to effectively serve as a body of Constitutional Adjudication. During a short-lived Socialist government in 1932 (it lasted for about two weeks), the Socialist Junta passed a decree (Decree with Force of Law, DFL 520) "enabling the government to seize any industrial concerned deemed *essential* to the economy--should it infringe the law" (Collier and Sater 1996: 342). Moreover, Allende also used a similar decree, passed during the Popular Front government (1939-42) that allowed "the government to requisition factories should they fail to operate efficiently, though without transferring formal ownership to the state" (Collier and Sater 1996: 342). The Allende government used those two decrees extensively. With the first decree the government nationalized certain industries and with the second it effectively took control of industries that had been ruled *non-nationalizable*. The *Contraloría* could not rule those decrees unconstitutional and the president's political coalition prevented Congress from overriding the president's veto power over any congressional attempt to repeal those decrees.

Ironically, the Constitutional Tribunal, created in 1970 during the last year of the Frei administration, did not rule on the constitutionality of the decrees. The Constitutional Tribunal was only a subject for

discussion after Allende considered the idea of holding a plebiscite on his mandate (a move unconstitutional in and of itself). As argued above, the political and social problems that plagued Chile during the Allende years probably rendered any efforts by the Constitutional Tribunal insufficient and unsatisfactory.

The breakdown of democracy in 1973 also brought the end of the Constitutional Tribunal. The *Contraloría*, however, continued to exist during the dictatorship. And although the *Contraloría* served the same function as before, by having the constitution suspended, the military governed entirely by decrees. The *Contraloría* simply registered the decrees and continued to monitor to whatever extent it could, government expenditures.

In 1977, when the United Nations voted to denounce human right abuses in Chile, the military government responded by calling for a national plebiscite on the military government's performance. The mockery plebiscite in a country under state of siege, with thousands of individuals victims of repression and human right abuses, political executions, exiles, political prisoners, banning of all political parties and no Constitution in place was questioned by the aging *Contralor General de la República*. The *Contralor's* resignation letter, on file since a few weeks before was immediately accepted. A new *Contralor* was appointed, he rushed to certify the validity of the plebiscite. Soon after the plebiscite was conducted, the *Contralor* was re-assigned to his old cabinet post and a third *Contralor* was appointed. The new *Contralor* was an official who had served in the *Contraloría* for years until he retired in early 1997 [<http://www.reuna.cl/hoy/43/contralo.htm>].

Whether the incident was representative of the importance of the *Contraloría* or yet one more anecdote of a dictatorial government is not relevant here. I am satisfied with showing that while the Constitutional Tribunal was disbanded, the *Contraloría* continued to serve a role even when the state of law no longer prevailed.

In 1980, the government enacted, through another questionable plebiscite, a new constitution. The 1980 Constitution included the provisions for a Constitutional Tribunal similar to the one adopted in the 1969 amendment. A 7-member court, renewable in half every four years was to take the role of Constitutional Adjudication. To be sure, the *Contraloría* continued to exist and was also granted Constitutional standing. The Constitutional Tribunal was to have a role in determining the constitutionality of laws and the *Contraloría* would continue to oversee government spending and the constitutionality of governmental decrees.

Table 1. Features of the Constitutional Tribunals in Chile

<i>Features</i>	<i>1925 Constitution w/ 1969 amendments</i>	<i>1980 Constitution</i>
<i>Members</i>	5	7
Appointed by Supreme Court	2 Justices	3 Justices
Appointed by President		1 Lawyer
Appointed by the National Security Council		2 Lawyers
Appointed by the Senate		1 Lawyer
Appointed by President, Senate Approval	3 Lawyers	
Term of Office	4 yrs, w/re-election	8 yrs, w/re-election
Impeachment procedures	Senate vote, by presidential request	No impeachment is possible
Quorum	3 members	5 members
<i>Review Powers</i>		
Constitutionality of Laws proposed	Yes	Yes, before they are enacted.
Constitutionality of Presidential Decrees	Yes	Yes.
Constitutionality of Plebiscites	Yes	Yes.
Conflict of interests by government officials	Yes	Yes.
Executive-Parliamentary conflicts	Yes	Yes.
Legality of Political Parties		Yes.
Timeframe for action	10 Days	
Convening Power	President or either chamber by simple majority	President or ¼ of the members of either chamber
Decisions of Court are final	Yes	Yes, but Tribunal may revise earlier rulings.

Supreme Court has Constitutional Adjudication Power	Art 86. Yes. But never used it.	No.
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A comparison between the 1969 Tribunal and the 1980 Constitutional Tribunal is shown in Table 1. The power of the Tribunal remains almost unchanged but convening the tribunal is now possible with a ¼ vote of either chamber (30 members in 120 member Chamber of Deputies or 12 senators in the 48-member Senate) or by the president.

The Constitutional Tribunal was established in 1982. All members were appointed by the Military Junta and by General Pinochet. During the 1982-1989 period, the Tribunal was characterized by rubber-stamping the decisions made by the Junta (legislative power) and the Pinochet government (executive). With a few exceptions, the Tribunal rulings were never in disagreement with the views of the military junta. Cavallo et al. (1988) report an instance where the Tribunal did rule in favor of the political parties of the opposition months before the 1988 plebiscite. Those rulings were, however, the exception rather than the norm. In fact, one of the original Constitutional Tribunal members, Eugenio Valenzuela, was no re-appointed to the Constitutional Tribunal in 1989 because “he fell out of favor for casting several independent votes and was not re-nominated by the military regime” (CHIP News, March 14, 1997).

After the 1989 presidential and congressional elections, the Constitutional Tribunal took on a more pro-active stand. The center-left coalition of opposition parties won the presidency and a majority of the elected members of both chambers. The Pinochet-appointed members of the senate and the Pinochet-appointed members of the Supreme Court provided a counter-weight to the center-left overwhelmingly high electoral support. Before leaving office, the Pinochet government finalized several structural reforms and put into effect several key provisions of the 1980 Constitution. Among them, the Central Bank Board of Directors and new members of the Constitutional Tribunal were appointed by

the outgoing Junta. The Central Bank appointments were negotiated with the opposition. The Pinochet government and the *Concertación* (Center-Left opposition) appointed two Board members each and the fifth member was agreed upon by both parties. A similar agreement was not proposed by the Military government on the appointments of Constitutional Tribunal members.

In March of 1997, 4 of the 7 members of the Constitutional Tribunal completed their terms. The re-composition of the Constitutional Tribunal stirred some controversy in the country. The senate appointed Eugenio Valenzuela (who had served in the early 80s), the military-controlled National Security Council appointed the two consensus names proposed by President Frei (Luz Bulnes and Mario Verdugo) and the Supreme Court appointed the Supreme Court President, Severardo Jordan. The other three members of the Tribunal will see their terms expire in 2001, they are justices Marcos Aburto and Osvaldo Faundez and lawyer Juan Colombo. The composition of the Tribunal reflects a bias towards pro-military stands (CHIP News, April 2, 1997).

Several people have criticized the Tribunal on the grounds that it does not reflect the political make up of the country. Constitutional expert Juan Subercaseux summarized those criticisms as follows: "This political alliance [*Concertación*], despite having been elected to power for the past seven years and despite constituting 66% of the population, has only 33% representation in the Constitutional Tribunal. The fundamental cause of this distortion is rooted in the anti-democratic composition of the National Security Council which is 50% military, and likewise in the false majority for the right in the senate (with eight designated senators) and the rightist majority in the Supreme Court (its members mostly designated by Pinochet). The policy of deal making with the right has only gained for the democratic forces one more vote in the Tribunal, and in the process has legitimized a governing majority that does not represent the true attitudes of the nation." (in CHIP News, April 2, 1997).

The leader of the Center-Left *Concertación*, President Frei has echoed those criticisms as well but has not questioned the existence of the Tribunal: “We are not against the Tribunal. Institutions like it exist in some form in all parts of the world. We do, however, feel that its make-up has to be legislative, judicial and executive” (in CHIP News, March 18, 1997).

Determining the composition of the Tribunal, rather than its constitutional mandate is the main concern of those who feel the Tribunal is one more of the so-called “authoritarian enclaves” left in the 1980 Constitution by the military. Nonetheless, even the most outspoken critics of the authoritarian enclave nature of the Constitutional Tribunal, Juan Subercaseaux, could only identify four instances of major Constitutional Tribunal rulings that seriously affected the center-left political decisions. The most important ruling was the 1989 decision to ratify the binomial electoral law established by the outgoing military regime and designed to boost the electoral chances of the pro-military forces, and the decision was made before the official return to democracy in March of 1990. In 1990, the Tribunal ruled in favor of upholding the 1978 Amnesty Law designed to give impunity to military personnel for human rights crimes. In 1995, the Tribunal ruled in favor of private banks over a dispute with the Central Bank. In 1996, in a controversial ruling, the Tribunal ruled in favor of private ownership of beaches along the extensive national coastal region (CHIP News, April 2, 1997).

The “authoritarian enclaves” of the 1980 Constitution will most likely remain at the center of the political debate in the country in the years to come. The Constitutional Tribunal will be a part of the debate insofar as its composition is concerned. Transferring the appointment power from the National Security Council to the President will be the most likely change in the make-up of the Tribunal. The profound reform of the Supreme Court already passed and to be implemented in 1998 will alter the composition of the highest court and, in the future, of the 3 Supreme Court appointees to the Tribunal. Finally, the future composi-

tion of the senate, where currently 20% of its membership is appointed rather than elected, will also have an effect on the persons appointed to the Tribunal. A compromise formula, similar to the one reached for the Directors of the Central Bank, will most likely be developed among all political forces for the composition of the Constitutional Tribunal.

Yet, the *Contraloría* will continue to play an important role in the process of Constitutional Adjudication in the country. The Tribunal will most likely be saved for the most profound constitutional issues. As in the recent dispute over the government's financing of a pre-electoral poll, the *Contraloría*, rather than the Constitutional Tribunal, will determine the constitutionality of the government's action (La Epoca, November 23, 1997; "<http://www.laepoca.cl/1997/11/23/not04.html>"). The two bodies in charge of Constitutional Adjudication will continue to divide their tasks. The *Contraloría* will oversee government spending, government decrees and executive orders, local government ordinances and spending. The Constitutional Tribunal will test a priori the constitutionality of laws and will interpret constitutional principles when so requested by the president or 1/4 of either chamber.

Constitutional Adjudication System in South America

South American countries have been characterized by having short-lived constitutional arrangements. Constitutional Conventions are often convened and new documents are drafted. Perhaps Argentina, whose Constitution dates back to 1853 (although several major amendments have been passed since then) is the only country where constitutional conventions have not become a tradition.

Table 2 shows the status of Constitutional Adjudication in the ten largest countries of South America (south of Panama). However, since 1991 several important constitutional reforms have been adopted. Argentina amended its Constitution in 1994, Brazil in 1997. Bolivia

adopted a new Constitution in 1994, Paraguay in 1992 and Peru in 1993. Ecuador modified its Constitution in 1996 and held new elections for a Constitutional Assembly in November 30, 1997 and the convention is scheduled to meet for the first time in late December 1997.

Table 2. Constitutional Adjudication in South American Countries
(As of 1991)

<i>Country</i>	<i>Year Constitution enacted</i>	<i>Constitutional Adjudication</i>	<i>Appointment of Supreme Court/ Constitutional Tribunal</i>	<i>ex-ante or ex-post review power</i>	<i>Ruling requested by</i>
Argentina	1853 (amended in 1855, 98, 1957, 96)	Supreme Court		Review after laws have been enacted	
Bolivia	1967	Supreme Court	1 president and 11 justices by Chamber of Deputies from list submitted by senate	Not determined, but Court cannot overrule itself.	
Bolivia	1994	Constitutional Tribunal	5 members, 10-year terms by 2/3 of Congress	Both.	President, 1/3 Congress, provin, munic. gov't, citizens
Brazil	1988	Supreme Court	11-members, 35-65 yers of age, by president with senate approval.	Review after laws have been enacted	Any citizen via Courts
Chile	1980	Constitutional Tribunal	7 lawyers. Supreme Court (3), President (1), Senate (1), National Security Council (2)	After Laws have been voted, before they take effect.	President, 1/4 of either chamber

<i>Country</i>	<i>Year Constitution enacted</i>	<i>Constitutional Adjudication</i>	<i>Appointment of Supreme Court/ Constitutional Tribunal</i>	<i>ex-ante or ex-post review power</i>	<i>Ruling requested by</i>
Colombia	1991	Constitutional Tribunal	Odd number, by senate from lists presented by president, Supreme Court and State Council, 8-year term, no re-election	Both, over legislation, decrees and plebiscites.	Any citizen via courts
Ecuador	1984	Constitutional Tribunal	11-members, 2 years, appointed by Congress from lists submitted by various groups.	Both. Tribunal assumes some congressional powers when Congress in recess.	Any citizen. via courts
Paraguay	1967	Supreme Court			
Peru	1979	Constitutional Tribunal	9-members by president (2), Congress (3) and Supreme Court (3)		
Uruguay	1966	Supreme Court	5-members, 10-year period by 2/3 of parliament, renewable.	Review after laws have been enacted	
Venezuela	1961	Supreme Court	9-members, 9-year terms, by Congress.	After Laws have been enacted.	Any citizen via courts.

From: Eastman, 1991.

Among the countries with new Constitutions, Bolivia was the only one to change the nature of Constitutional Adjudication. While the Supreme Court held that constitutional prerogative until 1994, the new constitution created a Constitutional Tribunal. With Bolivia, 5 South American countries have adopted Constitutional Tribunals for Constitutional Adjudication. Colombia was the fourth country to adopt a Constitutional Tribunal in 1991. Peru adopted the Tribunal in its 1979 Constitutional Convention when the military era came to an end. Chile adopted a Constitutional Tribunal in 1969, but the breakdown of democracy in 1973 delayed the emergence of a Tribunal until the return of democracy in 1990.

The remaining 5 countries maintain Judicial Review in the Supreme Court. Among them, Argentina and Brazil have the most established Constitutional Adjudication systems, although the Argentina tribunals have proven to be more independent than its Brazilian counterpart. Uruguay and Venezuela also have Judicial Review vested upon the Supreme Court. In the case of Paraguay, where the general Stroessner dictatorship came to an end in 1990 and a new Constitution was adopted, the final status of Constitutional Adjudication remains to be seen. The presidential elections of 1998 will be the first in the country where an elected president turns power to another elected president. It's not unlikely that further constitutional reforms will be adopted in that country. Brazil will probably also experience some constitutional reforms as the extensive, comprehensive and extremely detailed 1988 Constitution is reformed to allow for presidential re-election.

In general, all countries with Constitutional Tribunals restrict constitutional interpretation petitions to the president or to a group of Congressmen. Countries with Judicial Review extend the right to originate Constitutional Adjudication to all citizens. Yet, Bolivia, a country that created a Constitutional Tribunal in 1994, allows individual citizens to petition the Constitutional Tribunal to rule on certain areas. All the countries with Constitutional Tribunals give the power to appoint the

Tribunal members to the executive, legislative or a combination of both. In the case of Chile, however, the Supreme Court appoints directly 3 of the 7 Constitutional Tribunal members. In two of the countries with Judicial Review resting upon the Supreme Court, the members of the court are appointed by congress to fixed terms. In Venezuela, the 9 members of the Supreme Court are appointed to 9-year terms and in Uruguay the 5 members are appointed to renewable 10-year terms. So, even though constitutional adjudication is in the hands of the Supreme Court, Congress has a direct saying on the composition of the highest court.

As it can be observed, three of the five countries with Constitutional Adjudication power assigned to the Supreme Court have the oldest constitutions in the area. Argentina (1857), Uruguay (1966) and Venezuela (1961) have old constitutions promulgated before the countries with Constitutional Tribunals. Brazil (1988) and Paraguay (1992) were the only countries that promulgated constitutions after 1970 and did not adopt Constitutional Tribunals.

As Table 3 shows, Constitutional Tribunals have become popular in South American constitutions only in recent years. In 5 of the seven countries with new constitutions drafted after 1970 there are Constitutional Tribunals. Only 2 countries that adopted new constitutions maintained Judicial Review in the hands of the Supreme Court, and in both cases (Brazil and Paraguay) further constitutional reforms are very likely in the near future. In part, the transitions to democracy in the late 70s and 80s —after the period of military rule that most of these countries underwent during the late 60s and 70s— help explain why this change took place. When democracy was restored, most countries adopted strong reforms to guarantee constitutional rights and liberties to their citizens. The existence of an independent Constitutional Tribunal would constitute an additional safeguard against future attempts to subvert democracy.

In South America, only three countries, Argentina, Venezuela and Uruguay have maintained a solid tradition of Constitutional Adjudication in the hands of the Supreme Court. I do not have information as to how effective the process of Constitutional Adjudication has been in those countries. Deener reports that Argentina, Brazil and Mexico adopted judicial review before the end of last century. Yet “while in some of these latter states, notably Brazil, some use was made of Judicial Review, on the whole the principle was of little practical effect in nineteenth-century Latin America (1952: 1085).

Colombia, a country that had successfully experimented with Judicial Review on the hands of the Supreme Court (Grant 1948), abandoned its tradition and adopted a Constitutional Tribunal in 1990. Chile, Uruguay and Guatemala adopted the American system of Judicial Review in the period between World War I and World War II (Deener 1952: 1088), but Chile abandoned it in 1969. Deener (1952:1095) was not optimistic about the prospects of Judicial Review in Latin America in the early 1950s: “but there still remains the impression that the elaborate constitutional provisions for judicial review in Latin America are paper provisions rather than constitutional reality.”

So, even though some form of Judicial Review did exist in Latin America as early as the end of the nineteenth-century, only Argentina, Brazil and Colombia observed some form of Judicial Review by the Supreme Court. The remaining countries, even though had formally adopted provisions for constitutional review, have experienced most of their Constitutional Adjudication history with Constitutional Tribunals rather than Supreme Courts.

Table 3. Year of Adoption of Constitution and Constitutional Adjudication

<i>Constitutional Adjudication vested upon:</i>	<i>Constitution adopted before 1970</i>	<i>Constitution Adopted After 1970</i>
Constitutional Tribunal	0	5

Supreme Court	3	2
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Conclusion

The case of Chile might shed some light as to the history of Constitutional Adjudication in South American countries. In one form or another, Constitutional Adjudication was present, at least in paper, in almost every constitutional experiment in the country since independence. Effective constitutional adjudication, however, did not exist until the adoption of a Constitutional Tribunal in 1969. And even then, the breakdown of democracy in 1973 prevented the Tribunal from becoming a permanent institution in the country until the restoration of democracy in 1990.

From 1833 to 1925, the power to interpret the constitution was vested upon parliament. Deener reports that Ecuador (1929) and Peru (1933) had similar arrangements (1952: 1088). In 1925, Judicial Review was vested upon the Supreme Court, but the Court failed to actively take on this new role. *The Contraloría General de la República* filled the gap and, in the case of Chile, effectively emerged as the body that interpreted meanings of laws and decided on several constitutional issues. Only three countries witnessed their Supreme Court taking a more pro-active role as Constitutional Adjudication organs: Argentina, Brazil and Colombia. And little literature is available on the history of Constitutional Adjudication in those countries.

Provisions for Constitutional Tribunal are rather recent in the area. Chile was apparently the first country to formally adopt a Constitutional Tribunal. All the countries that now have Constitutional Tribunals reformed their Constitutions after 1970. Constitutional Tribunals are, then, a fairly new phenomenon in South American countries. Their

effectiveness, independence and ability to interpret the constitution and emerge as referees in constitutional matters is yet to be tested. It is, indicative, however, that a majority of the countries that have reformed their constitutions are assigning the role of Constitutional Adjudication to Constitutional Tribunals rather than to Supreme Courts. Perhaps even though the American Constitutional and political experience has undoubtedly shaped the rest of the Americas, Latin American constitutional history and legal background remains that of civil law and primarily Spanish law (Deener 1952: 1085). To be sure, the similarities between the political system in Latin America and the United States, with a strong president elected democratically, is evidence of other similarities that also exist between the political system in the United States and in Latin America. The latter was certainly if not modeled, significantly influenced by the former. Yet, as I have shown above, constitutional adjudication in Latin America has also been shaped by what has developed in European Constitutions and by its own judicial tradition of civil law. Constitutional Adjudication exists today in all nations in South America. In some, it has been adopted following the European model of Constitutional Tribunals while in others, those that adopted Judicial Review earlier, the American model of the Supreme Court as the guardian of the Constitution was chosen. Clearly, the more entrenched civil law is in any given country, the more difficult it will be for the Supreme Court to either develop a doctrine of Judicial Review (as it happened in the United States) or to pro-actively make use of the existing constitutional provision.

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